92-617

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1992, Term

ROBERT J. URWYLER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT J. URWYLER
In Propria Persona
c/o P.O. Box 4361
Modesto, California 95352
(209) 521-4892

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Commissioner of Internal Revenue has jurisdiction to impose penalties on the petitioner for failure to comply with agency information collection and record keeping requests which fail to display an OMB control number, in violation of the Paperwork Reduction Act of 1980?

B. Whether the U.S. Tax Court has jurisdiction to affirm penalties imposed on the petitioner by the Commissioner of Internal Revenue for failure to comply with agency information collection requests and record keeping requirements which do not display the required OMB control numbers?

C. Whether Congress gives a right and a duty to the petitioner, as a member of the American public, to enforce the

Public Protection Provisions of the Paperwork Reduction Act of 1980?

D. Whether, Congress gives jurisdiction to the Federal Courts to deny the applicability of the Paperwork Reduction Act to the IRS' instruction manuals for form 1040 and regulations relating to information collection and record keeping requests?

E. Whether there is any ambiguity in the Paperwork Reduction Act's Public Protection Clause which would necessitate a judicial determination as to its applicability.

TABLE OF CONTENTS

Page

Opinions Below.....1

Jurisdiction.....2

Statutory and Regulatory Provisions.....3

Statement of the Case.....4

Argument.....10

Reasons for Granting Writ.....42

Conclusion.....45

Appendix:

A. Order and Opinion of the U.S. Tax Court, filed April 10, 1990.....A-1

B. Order and Opinion of the Ninth Circuit Court of Appeals filed September 25, 1991.....B-1

C. Order of Ninth Circuit Court of Appeals denying Petition for Rehearing Filed June 24, 1992.....C-1

D. Petitioner's Notice of Jurisdictional Defect to U.S. Tax Court mailed October 4, 1989.....D-1

TABLE OF AUTHORITIES

California Bankers Assoc. v. Shultz, 416 U.S. 21, 45-54 (1974)....13, 14

Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1983).....13

Dole v. United Steelworkers of America, 494 U.S. ____, 110 S.Ct. 929 (1990).....18

U.S. v. Collins, 290 F.2d 619, 630 n. 13 (10th Cir. 1990).....34

U.S. v. Hatch, 919 F.2d 1394 (9th Cir. 1990).....35, 36, 44, 46

U.S. v. Smith, 866 F.2d 1092 (9th Cir. 1989).....34, 35, 46

U.S. v. Van Griffin, 874 F.2d 634, 638 (9th Cir, 1989).....42

16 U.S.C., Section 551.....35

26 U.S.C., Section 6001...12, 14, 15, 45

26 U.S.C., Section 6011...12, 14, 15, 45

26 U.S.C., Section 6012...12, 14, 15, 45

26 U.S.C., Section 6091.....45

26 U.S.C., Section 6091(a).....15

26 U.S.C., Section 6091(b).....16

44 U.S.C., Section 3504(c)(3)(C).....23

44 U.S.C., Section 3507(f)....26, 32, 36

44 U.S.C., Section 3512..3, 6, 9, 10, 25
38, 43, 45, 47

5 C.F.R., Section 1320.....37, 38

5 C.F.R., Section 1320.5.....25

5 C.F.R., Section 1320.5(d)....3, 33, 34
43, 47

26 C.F.R., Section 1.6001-1.....5

26 C.F.R., Section 1.6011-1.....5

26 C.F.R., Section 1.6012-1.....5

26 C.F.R., Section 1.6012-1(7).....17

26 C.F.R., Section 1.6091-2.....16

26 C.F.R., Section 1.6091-2(c).....16

48 Fed. Reg. 13666-70.....37

48 Fed. Reg. 13667.....38

48 Fed. Reg. 13669.....38

48 Fed. Reg. 13676.....37

S. Rep. No. 99-347.....25

S. Rep. No. 99-930.....25

1980 U.S. Code Cong.
& Admin.News, 6242.....25, 26

1980 U.S. Code Cong.
& Admin.News, 6288.....26

1980 U.S. Code Cong.
& Admin.News, 6289.....27, 28

1980 U.S. Code Cong.
& Admin.News, 6300-6301.....27

IR Manual (10)260
Section 167.4(4-2-85)
Internal Audit Handbook
at (10)260-57; Addendum.....39, 40

IR Manual 35(44)1.6 (1-188)
Correspondence,
at 35(44)0-4 to 0-6; Addendum....40
41

IR Manual (39)317,
Section 338.2 (10-12-88)
Regulation Drafting Handbook
at (39)317-19; Addendum.....41, 42

IRS Instructions to Form 1040.....19, 20
21, 22, 23

Fed. R. Evid. 801(d)(2)(D).....42

OPINIONS BELOW

The order and opinion of the United States Tax Court, filed on April 10, 1990, is included herein as Appendix "A".

The unpublished opinion of the Ninth Circuit Court of Appeals filed on September 25, 1991, which affirmed in part and vacated in part the U.S. Tax Court, is set forth as Robert J. Urwyler v. Commissioner of Internal Revenue, No. 90-70381, and is included herein as Appendix "B".

The order denying petitioner's Petition for Rehearing was entered on June 24, 1992 and is included herein as Appendix "C".

JURISDICTION

Jurisdiction of the United States Supreme Court to review the ruling of the Ninth Circuit by Writ of Certiorari is conferred pursuant to 28 U.S.C., Section 1254(1).

The Ninth Circuit Court of Appeals denied petitioner's Petition for Rehearing, which was based solely and entirely on the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C., 3501 et seq.

The order was filed on June 24, 1992.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

44 U.S.C., Section 3512.

"Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director or fails to state that such request is not subject to this chapter."

5 C.F.R., Section 1320.5(d)

"Whenever a member of the public is protected from imposition of a penalty under this section for failure to comply with a collection of information, such penalty may not be imposed by an agency directly, by an agency through judicial

process, or by any person through judicial or administrative process."

STATEMENT OF THE CASE

The petitioner was served with Notices of Deficiency for Federal Income Taxes for years 1982, 1983 and 1984. The subject notices are making claims on petitioner for income tax deficiencies and various penalties. Due to the IRS/Treasury Department's failure to comply with the provisions of the Paperwork Reduction Act of 1980 (PRA), the Federal government, including the Tax Court, is lacking jurisdiction to penalize petitioner for failing to file Form 1040 income tax returns for the subject years.

The basis for the government's assertion, that petitioner is liable for the subject taxes and penalties, are the

federal income tax regulations codified within 26 C.F.R. Sections 1.6001-1, 1.6011-1 and 1.6012-1. These tax regulations constitute information collection requests which must display OMB control numbers.

Instructions to federal income tax forms likewise constitute information collection requests which must display OMB control numbers.

The PRA provides that, before a federal agency may engage in the collection of information, it must obtain an OMB control number and display such number on the information collection request. The PRA specifically defines reporting requirements, or other similar methods calling for the collection of information, as "information collection requests". No federal statute requires

the filing of any specific income tax return form, much less Form 1040; therefore, recourse to the IRS regulations is necessary to determine how to comply with the law.

Furthermore, numerous regulations require the instructions to determine how to comply with the law. The forms themselves require the instructions, and the instructions impose reporting and record keeping requirements independent of the statutes and regulations. Therefore, the regulations and instructions fall within the statutory definition of "information collection requests".

Pursuant to the public protection clause of the PRA, 44 U.S.C., 3512

> **Notwithstanding any other provision of law,** no person shall be subject to ANY penalty for failing to ... provide

> information to an agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter. (Emphasis added.)

No regulation requiring the filing of Form 1040 displays an OMB control number or a statement of inapplicability of the PRA; neither do the instructions related to Form 1040. Therefore, petitioner cannot suffer any penalty for not filing Form 1040 for 1982, 1983 and 1984.

The intent of Congress, as well as the plain language of the statutory scheme, do not provide that the provisions of the statute are satisfied by displaying OMB control numbers only on a "form". Every requirement or reference to the "display" requirement is related

to an "information collection request". While Form 1040 may fall within the definition of an "information collection request", **it does not require its own filing**. The requirement to file the Form is contained in the regulations and instructions. The mere existence of Form 1040, in and of itself, imposes no burden upon the public other than the time required to fill in the blanks.

Conclusively proving petitioner's argument, the IRS acknowledges its obligation to display control numbers in the text of treasury regulations and in the upper right hand corner of the instructions for return forms, but has chosen to ignore its duty because this agency disagrees with the law. petitioner can only presume that the IRS expects to get preferential treatment in the Federal

courts since this agency feels it is above the statutory mandates of Congress.

The petitioner does not claim that the PRA relieves him of any responsibility to pay taxes which may be owed under the law, but merely that he had no legal obligation to supply information to the IRS because the "information collection requests" which require reporting and recordkeeping have been rendered nugatory, due to the IRS' failure to comply with the PRA. Further, petitioner can suffer no penalty for not complying with such unauthorized "bootleg" requests. All penalties the Commissioner imposed upon petitioner and which were affirmed by the Tax Court are prohibited by section 3512 because petitioner could refuse to comply with

"bootleg" requests by exercising his legal rights under the PRA.

Petitioner does assert that the absence of the OMB control numbers applicable to any tax regulation or instructions requiring the "making of tax returns", as a matter of law, bars the imposition of penalties, civil or criminal, for failure to comply with such information collection requests, as more fully set forth in the ARGUMENT hereunder. 44 U.S.C., Section 3512.

ARGUMENT

The duty to file an income tax return can only be fulfilled by following the instructions in preparing a return "meeting the requirements of the Code". Since no duty exists, independently of the instructions, to state specifically the items of gross income and any

deductions and credits to which petitioner was entitled, the request for such information must comply with the Paperwork Reduction Act before a person can be penalized for failing to provide information that is requested by Form 1040 instructions.

Since Congress expressly forbids Federal agencies to impose any penalty for failure to respond to information collection requests which do not display a current OMB control number, the Commissioner was without authority to impose any penalties on petitioner in this instant case, thus, the Notices of Deficiency are rendered null and void by the fact that they imposed penalties in violation of the provisions of the PRA.

The fact that the subject deficiency notices were rendered invalid by the

imposed penalties also denied jurisdiction to the Tax Court. Furthermore, **Congress expressly annulled the Federal court's jurisdiction when an administrative agency fails to comply with the Paperwork Reduction Act**, thus, the Tax Court proceeded without jurisdiction when it affirmed penalties on petitioner.

The requirement for any person to file a return is imposed by the implementing regulations for 26 U.S.C. Sections 6001, 6011, and 6012 which provide in pertinent part:

> Every person liable for any tax imposed by this title ... shall ... make such returns, and **comply with such rules and regulations** as the Secretary may ... prescribe. Whenever in the judgment of the Secretary it is necessary, he may require any person ... **by regulations**, to make such returns ... as the

> Secretary deems sufficient to show whether or not such person is liable for the tax under this title.... [Emphasis added]

Thus, the plain meaning rule applies in this case before the Court. See e.g., Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1983), wherein the Supreme Court held:

> ... [I]n determining the scope of the statute, one is to look first at its language. If the language is unambiguous, ...it is to be regarded as conclusive unless there is a clearly expressed legislative intent to the contrary.

Therefore, the Court must conclude that no duty to file tax forms and provide information exists until **forms or regulations are prescribed by the Secretary**. This rule of statutory construction was exhaustively explained by the Supreme Court in California Bankers Assoc. v. Shultz, 416 U.S. 21, 45-54 (1974). Here, the Supreme Court

found that Congress has the power to delegate such authority by a general authorization in a statute, and the Supreme Court used the Internal Revenue Code as an example:

> The Internal Revenue Code... contains a general authorization to the Secretary of the Treasury to prescribe by regulation records to be kept by both business and individual taxpayers, 26 U.S.C. Section 6001, which has been implemented by the Secretary in various regulations.
> California Bankers, at 45.

Internal Revenue Code Sections 6001, 6011 and 6012, which relate to requirements to make tax returns, impose reporting duties only insofar as the Secretary of the Treasury properly prescribes regulations and reporting forms. Therefore, there can be no violation of the statute without a corresponding violation of the

implementing instructions, forms and regulations. The corresponding regulations provide the manner and means to implement the reporting requirements authorized by these three sections, without which these sections would be virtually meaningless. Additionally, the statutes pertaining to income taxes do not identify the appropriate tax forms or schedules required to make a legally sufficient tax return. This information is contained only in the regulations and instructions to the tax forms.

The filing of returns required to be made under 26 U.S.C. 6001 is provided for at 26 U.S.C. 6091(a), wherein the Secretary is directed to promulgate regulations prescribing the place for the filing of returns. The regulations prescribed by the Secretary are necessary

to implement the law and are, therefore, "information collection requests" as defined by the PRA.

The filing of returns required under 26 U.S.C. 6011 and 6012 is provided for at 26 U.S.C. 6091(b), wherein returns are to be made with the Secretary at either an internal revenue district in which the legal residence is located of the person making the return, or at the service center servicing said district, "as the Secretary may by regulations designate". These regulations prescribed by the Secretary are necessary to implement the law and are, therefore, "information collection requests" as defined by the PRA.

Regulations 26 C.F.R. 1.6091-2 pertains to the filing of income tax returns. Section 1.6091-2(c) directs

that, whenever **instructions** applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed **in accordance with the instructions.** The instructions for Form 1040, under the heading "Where to File", direct the filing of returns with a service center. Thus, Form 1040 instructions are an "information collection request" as defined by the PRA.

Further proof that the instructions are information collection requests is found at 26 C.F.R. 1.6012-1(7), wherein the IRS requires that "Form 1040A may be filed only by those individuals entitled to use such form as provided by and in **accordance with the instructions** for such form". [Emphasis added]

Again, the PRA defines the "collection of information" as "the obtaining or soliciting of facts or opinions by an agency through the use of ... reporting or recordkeeping requirements ... calling for ... answers to identical questions imposed on ten or more persons". In Dole v. United Steelworkers of America, 494 U.S.__, 110 S.Ct. 929 (1990), the Supreme Court considered whether agency action constituted a "collection of information". Under Dole's objective test, an action is a "collection of information" if it involves "a person maintain[ing] information for an agency or provid[ing] information to an agency", but not if it merely involves "disclosure by one party directly to a third party". Dole, 110 S.Ct. at 937-938.

If Form 1040 instructions satisfy this test, they constitute a "collection of information" and, thus, they are subject to OMB review and must display an OMB control number. Accordingly, one need only to look to the instructions themselves to resolve the question of whether or not they constitute an information collection request that is independent of Form 1040.

For example, included within the 47 pages of instructions for the 1984 Form 1040, there is a specified recordkeeping requirement at page 18:

> Keep records of income, deductions, and credits shown on your return, as well as any worksheets used to figure them, until the statute of limitations runs out for that return. Usually this is 3 years from the date the return was due or filed, or 2 years from the date the tax was paid, whichever is later. **Also keep copies of your filed returns as**

> **part of your records.** You should also keep some records longer. For example, keep property records (including those on your own home) as long as they are needed to figure the basis of the original or replacement property. **For more details, get Publication 552, Recordkeeping for Individuals and a List of Tax Publications.** [Emphasis added]

In contrast, the IR Code and corresponding regulations set forth nebulous recordkeeping requirements which lack any requirement to keep a copy of a filed return or the specific retention period provided in the instructions.

Further evidence that the instructions are necessary to file a proper tax return is provided by the 26 references to the instructions and 42 references to other related schedules and forms **appearing on the face of the 1984 Form 1040.** (Such related schedules and forms request additional information and

require attachment to Form 1040.) In fact, the only portions of the 1040 Form which do not require the taxpayer to "follow" (i.e. supply information in conformity with) the instructions are the sections requiring the taxpayer to provide his/her name, address, social security number, signature and occupation.

Furthermore, the instructions -- not the 1040 Form -- define: (1) who must file (2) who should file (3) which forms to file(e.g.,1040, 1040-EZ, 1040-A, 1040-ES, 1040NR, W-2, W2G, W-2P & 1099, 2106, 2119, 2210, 2441, 3468, 3903, 4136, 4562, 4684, etc.) (4) which schedules (A, B, C, D, E, F, G, SE, etc.) to file and (5) when to file, including references to filing extensions that are not

not defined in the statutes or in the regulations.

Additionally, the taxpayer must resort to the instructions for the relevant tax tables, other forms, returns, schedules, worksheets, and the list of Schedules, Forms and Publications for completing Form 1040 and referenced throughout the instructions. Of course, these other forms, schedules, and publications contain their own references to still more forms, schedules, and publications, thereby creating an elaborate web of interrelated and cross-referenced documents.

Furthermore, the instructions -- not the 1040 Form -- contain the required statement informing the person who receives and responds to the information collection request "why the information

is being collected, how it is to be used, and whether the responses to the request are voluntary, required to obtain a benefit, or mandatory", pursuant to 44 U.S.C. 3504(c)(3)(C). See, e.g., "Privacy Act and Paperwork Reduction Act Notice", at page 43 of the 1984 Form 1040 instructions.

In sum, it is clear that Form 1040 alone is not susceptible to accurate completion without the instructions. Conversely, an individual who had the instructions, but not the Form, could accurately compile and provide the required information. The instructions require records to be maintained, and the instructions provide the requisite interpretive guidance as well as the requirements to complete and file the Form. In short, the instructions and the

regulations specify exactly what information must be disclosed by the taxpayer. It is impossible for petitioner to determine and fulfill any duties to file Forms 1040 under the statutes without the specificity provided in the regulations and the instructions.

Neither the regulations nor the instructions pertaining to the requirements to make and file Form 1040 display an OMB control number, an expiration date, or explain why they do not. Since, as shown above, they are an integral and implementing part of the reporting plan which calls for the collection of information respecting the federal personal income tax, they are required to display an OMB control number and expiration date, or explain why they do not.

The Public Protection Clause of the PRA states:

> **Notwithstanding any other provision of law,** no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter. 44 U.S.C. 3512. [Emphasis added]

See 5 C.F.R. 1320.5; S.Rep.No. 96-930 at 52 reprinted in 1980 U.S.Code Cong. & Admin.News, 6292; and S.Rep.No. 99-347 at 8, 52, 53, 122-42 (1986). The Senate Report repeatedly explains Congress' intent:

> The bill ... **[r]equires all information requests of the public to display a control number ... Requests which do not** reflect a current control number or fail to state why not, are "bootleg" requests and **may be ignored by the public.**

1980 U.S.Code Cong. & Admin.News, 6242.
[Emphasis added]

Section 3507(f) declares no agency shall engage in a collection of information without obtaining from the Director a control number to be **displayed upon the information collection request.** This requirement complements the provisions of section 3512 on public protection.

1980 U.S.Code Cong. & Admin.News, 6288.
[Emphasis added]

S. 1411 also puts in place a public protection provision. After December 31, 1981, **no person will be subject to penalties or need to comply with any Federal information collection request** which has not gone through the OMB clearance and approval process. **Any agency information request to the public which does not display a current OMB**

control number, or if not, states why not, **can be ignored.**

1980 U.S.Code Cong. & Admin.News, 6300-6301. [Emphasis added]

The Senate Report makes it painstakingly clear that the public protection clause applies to all information collection requests, with a few clearly specified exceptions. The clearance and final approval or disapproval of all collections of information have been vested with OMB. The Public Protection Clause applies, whether the reporting or recordkeeping is required by a general or specific statute, regulation, or any other method:

> **The fact the collection of information is specifically required by statute does not, however, relieve an agency of the obligation to submit the proposed collection for OMB approval**

1980 U.S.Code Cong. & Admin. News, 6289. [Emphasis added]

The design of the Act was both novel and radical, giving OMB regulatory and approval discretion over all broadly defined "collection of information" by Federal agencies, and rendering ineffectual all non-exempted collections not approved by OMB. OMB's authority under the Act supersedes existing laws and regulations, to the extent that any conflicts arise. The Public Protection clause directs the regulated public to enforce the Act by refusing to provide information to a Federal agency "[u]nless the collection of information has been authorized" under the standards set forth in the Act. All information collection requests must either display a current control number or state that the request

is not subject to the Act; otherwise, the Public Protection clause applies.

Congress' irrefutable purpose was to bring all information collection requests, such as regulations, forms, and questionnaires under the rigorous scrutiny and necessary approval of OMB, whether mandatory or voluntary.

Congress was cautious -- no, fastidious -- to close every loophole and shut every door through which an agency could escape OMB's regulatory clearance and approval process.

If regulations were not covered by the Act, then forms and other documents, duly promulgated by the agencies as rules or regulations would escape OMB's scrutiny. Such documents could then be issued to respondents, skirting the clearance process and display of an OMB

number. Under such conditions it would then be impossible for the public to determine when it could legally refuse to comply with a request. To further thwart the intent of Congress, Federal agencies could also design their regulatory scheme to compel respondents to report or maintain records by regulations without issuing forms and other documents.

To aid the regulated public in policing the agencies with this unique legislation, a masterful "system-at-a-glance" was designed to facilitate the instantaneous determination as to whether or not an agency was in compliance with the Act. An OMB control number has to be displayed in the upper right hand corner of every approved information collection request, every regulation, form, questionnaire, survey, instruction manual

and other documents which contain a paperwork burden.

Through the Public Proection Clause, **Congress gives the public the power and the duty to enforce the statute by refusing to comply with "bootleg requests"**. The PRA requires OMB control numbers to be displayed upon all information collection requests in the upper right hand corner of the first page, for the express purpose of alerting the public as to whether or not the information collection request is authorized.

Without the OMB control number properly displayed upon instructions, regulations, and other requests, the public is alerted that it need not comply because the request is unauthorized.

Should a Federal agency be permitted not to comply with the precise language of Section 3507(f)--prohibiting them from engaging "in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request "--the alerting and enforcement mechanism envisioned by Congress would be destroyed.

As demonstrated herein, any other interpretation of the PRA will allow the agencies to escape, and thus defeat, this unique Act of Congress.

Thus, when Congress enacted the PRA, the lawmakers closed all the loopholes. This means an agency must get clearance from the OMB and must display an OMB number upon all requests, regardless of

how the collection of information is made.

Congress intended that the legally unsophisticated American Public--in their newly appointed duties as cops and enforcers of the PRA--could easily verify an agency's compliance or non-cmpliance with the entire statutory scheme by seeing the presence or absence of an OMB control number.

Congress' intent was to give the regulated public -- via the Public Protection Clause -- enormous power and leverage by creating an enforcement army comprised of all the public.

As the regulations to the PRA make clear:

> Whenever a member of the public is protected from imposition of a penalty under this section for failure to comply with a collection of information, **such penalty may not be imposed by**

> an agency directly, by an agency through judicial process, or by any person through judicial or administrative process.
> 5 C.F.R. 1320.5(d) [Emphasis added]

In consideration of the above, compliance with the general filing requirements of the Code necessarily implicates compliance with the more specific requirements authorized in the implementing regulations and specified in the instructions to the tax forms. The Tenth Circuit recognized this when it held that " ... the provision of information in 1040 forms is **inexorably linked** to the statutory requirements to pay taxes. ..." United States v. Collins, 290 F.2d 619, 630 n. 13 (10th Cir. 1990) [Emphasis added]

In U.S. v. Smith, 866 F.2d 1092, **the Ninth Circuit Court** of Appeals determined that any "agency regulations that require

disclosure of information to the government and that call for the disclosure or reporting of information through answers to standardized (identical) questions "are" information collection requests within the meaning of the PRA". Smith, F.2d at 1098-99. Therefore, **the Ninth Circuit Court** held that Section 3512 precluded "any penalty" for the failure to comply with the statutory requirements implemented by the regulations, including criminal conviction. Smith, 866 F.2d at 1099.

Again, in Hatch, 919 F.2d at 1394, **the Ninth Circuit Court** of Appeals noted that the Forest Service had failed to comply with the PRA in issuing regulations for implementing 16 U.S.C. 551, and reversed a conviction for failure to comply with such regulations.

Indeed, the government conceded that the two regulations in question did not display an OMB control number "as required by 44 U.S.C. 3507(f). Hatch, 919 F.2d at 1395-96.

The Ninth Circuit Court pointed out:

> [t]he Congressional directive in regard to the procedure to be followed in the issuance of agency regulations must be strictly complied with, since the issuance of regulations is in effect an exercise of delegated legislative power. ... **Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued, and consequently it is ineffective.**

Hatch, 919 F.2d at 1397. [Emphasis added]

The analysis of **the Ninth Circuit Court** makes it clear that the question is simply whether the regulations, instructions, and rules implementing the

requirements of the IR Code are, or are not, "information collection requests".

In promulgating the final rules for the PRA, 5 C.F.R. Part 1320, the OMB devoted at least six pages to this very issue. See 48 Fed. Reg. 13666-70, 13676 (March 31, 1983). he following excerpts are particularly pertinent:

> **It is not possible to argue that OMB clearance authority is confined to forms and similar instruments. ...**
>
> Many reporting requirements are enforced by means of forms, but other reporting requirements and virtually all recordkeeping requirements are imposed by other means, including ... -- **most significantly -- regulations.** Moreover, many forms are themselves specifically contained in regulations, either as part of the regulatory text or as an appendix.
>
> An exemption for regulations would result in a large and unwarranted loophole in the Act -- a loophole including all forms published in regulations,

> virtually all recordkeeping requirements .... Such a result would **fly in the face of the announced congressional intention ...**
>
> A distinction between reporting requirements in rules and those in forms -- with only the latter covered -- would also breed confusion, especially for the public. Many forms are published in the Code of Federal Regulations as part of a rule; others are cross referenced in rules; others closely follow regulatory specifications.
>
> 48 Fed. Reg. 13667 (March 31, 1983). [Emphasis added]

One of the stated purposes for displaying a control number in regulations was to make it unnecessary for courts to strike down, under section 3512, a regulatory scheme that depends on collection of information by means of regulation. 48 Fed. Reg. 13669 (March 31, 1983). This constitutes an express acknowledgement by OMB of the correctness of petitioner's position asserted herein.

The IRS is aware of its obligation to display OMB control numbers on the subject regulations and instructions.

Even beyond the notification to the IRS by the clear and unambiguous language of the PRA and its regulations, the IRS has acknowledged that its forms, instructions, rules, regulations, and other similar methods constitute "information collection requests" requiring both OMB approval and display of an OMB control number.

The IR Manual contains the following party admissions:

> (1) The Paperwork Reduction Act of 1980 requires all government agencies to obtain OMB approval for all Information Collection Requests (ICRs). **An ICR is any requirement to record, maintain, provide or report information. This includes any form, notice, letter, stuffer, questionnaire, survey, manual instruction, recordkeeping**

> **requirement or other oral or written means by which identical requests of information are made** from 10 or more persons, whether the response is voluntary or mandatory. [Emphasis added]

> (2) An OMB clearance number and expiration date are used to identify all ICRs subject to the Paperwork Reduction Act that are cleared by OMB. **Starting January 1, 1982, all ICRs must include the clearance number and expiration date.**

IR Manual (10)260, Section 167.4 (4-2 85), Internal Audit Handbook, at (10)260-57; Addendum. [Emphasis added]

> (1) Public Law 96-511, "Paperwork Reduction Act of 1980", requires that public use forms and documents must be submitted to the Office of Management and Budget (OMB) for approval before the form or document may be issued...
>
> (b) Upon approval, OMB assigns an OMB Number and Expiration Date to each item...
>
> (d) Effective 1/1/82, the OMB Number and Expiration Date must be on the item...
>
> (3) The items which carry OMB information can be classified into two categories as follows:

(a) Information Collection Requests (IRSs) -- An ICR is a form (letter, notice, etc.) which is used to request information from ten or more taxpayers, whether mandatory or voluntary, necessary to carry out the Internal Revenue laws of the United States. Each ICR is assigned a unique OMB Number. ICRs include, but are not limited to:

1 major tax forms and Instructions;

2 public use forms;
3 C, (SC), and (SC/SP) letters

4 draft and dictated letters; and

5 CP notices ...

(7) **OMB requires that the OMB Number and Expiration Date, when required, appear in the upper right corner of the document.** [Emphasis added]

IR Manual 35(44)1.6 (1-188), Correspondence, at 35(44)0-4 to 0-6; Addendum. [Emphasis added]

(1) If the regulations or proposed regulations include a provision that requires taxpayers to keep records or to report information to the IRS, the

Paperwork Reduction Act requires that the regulations be approved by the Office of Management and Budget (OMB) before they may be promulgated as final or temporary regulations...

IR Manual (39) 317, Section 338.2 (10-12-88), Regulation Drafting Handbook, at (39)317-19; Addendum. [Emphasis added]

Note that the Regulations Drafting Handbook Manual Transmittal originated in the Office of Chief Counsel, IRS.

The above IR Manual provisions are party admissions by the IRS that it fully understands the duty imposed upon it by the PRA.

[See U.S. v. Van Griffin, 874 F.2d 634, 638 (9th Cir. 1989)_(government manuals admissible as party admissions under Fed.R.Evid. 801(d)(2)(D)].

REASONS FOR GRANTING WRIT

This Petition for Certiorari is based on the fact that the Appeals Court ignored the following:

1. The Court has ignored the provisions of Title 44 United States Code, Section 3512, the Public Protection Provision of the Paperwork Reduction Act, as it applies to the jurisdiction of the United States Tax Court in affirming various penalties against petitioner, imposed by the Commissioner of Internal Revenue for failure to respond to the agency's information collection requirements and recordkeeping requests which fail to display OMB approval numbers.

2. The Appeals Court has ignored the regulatory provisions of 5 C.F.R., Section 1320.5(d) which clearly states that a penalty for failure to comply with a collection of information in violation of the Act **may not be imposed by an agency directly, by an agency through judicial process, or by any person**

through judicial or administrative process.

3. The Ninth Circuit Court of Appeals has ignored its prior ruling in U.S. v. Hatch, 919 F.2d 1394 (1990).

CONCLUSION

The petitioner has clearly demonstrated that the IRS/Treasury Department has failed to comply with the provisions of the law requiring it to display OMB control numbers on the instructions and regulations associated with 26 U.S.C. 6001, 6011, 6012, and 6091, even though the agency has fully acknowledged that its forms, instructions, rules, regulations and other similar methods constitute "information collection requests", requiring both OMB approval and display of an OMB control number. In the absence of such compliance, the public protection clause of 44 U.S.C. 3512 deprives the United States of jurisdiction to penalize petitioner in any manner for failing to file Form 1040 income tax returns.

The Ninth Circuit Court of Appeals has clearly departed from its prior rulings in U.S. v. Smith and U.S. v. Hatch. **This is not a tax case, the Petitioner does not claim that the PRA relieves him of any responsibility to pay taxes which may be owed under any applicable law. The Petitioner is merely exercising his legal right of refusing to furnish information and keep records based on what Congress has defined as "bootleg requests".**

Because of his refusal to furnish information and keep records as requested by "bootleg requests", the Petitioner has been assessed penalties by the Commissioner of Internal Revenue, the U. S. Tax Court has affirmed these penalties and added sanctions on top of it all and, furthermore, the Ninth

Circuit Court of Appeals has affirmed the penalties and sanctions with minor modifications.

The Public Protection Clause, 44 U.S.C. Section 3512, clearly forbids the imposition of penalties if the information collection request does not display a valid OMB control number or fails to state that such such request is not subject to the Act.

Furthermore:

> Whenever a member of the public is protected from imposition of a penalty under this section for failure to comply with a collection of information, such penalty may not be imposed by an agency directly, by an agency through judicial process, or by any person through judicial or administrative process. 5 C.F.R. 1320.5(d)

Thus, the jurisdiction to impose penalties for refusing to comply with

"bootleg requests" for information has not been given to any person, administrative agency or court, notwithstanding any other provision of law.

In the absence of jurisdiction to penalize, the United States, the IRS/Treasury Department, the Tax Court and the Ninth Circuit Court of Appeals are barred by the Paperwork Reduction Act from imposing any of the subject penalties. Therefore, the Petitioner urges this Court to grant certiorari and fully review this case.

Dated this 5th day of October, 1992.

Respectfully submitted,

Robert J. Urwyler
in Propria Persona
c/o P.O. Box 4361
Modesto, California 95352
(209) 521-4892

APPENDIX

APPENDIX "A"

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ROBERT J. URWYLER,	)	
	)	
Petitioner,	)	Docket No.
	)	5688-89
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

ORDER OF DISMISSAL AND DECISION

Respondent's motion for damages under I. R. C. Section 6673 and respondent's motion to dismiss for failure to properly prosecute were filed by the Court on October 16, 1989, and November 2, 1989, respectively, and taken under advisement by the undersigned. After a review of this record and for the reasons appearing in the Memorandum Opinion filed April 10, 1990, it is

ORDERED that respondent's motion to dismiss filed on November 2, 1989, is hereby granted and this case is dismissed for failure to properly prosecute pursuant to the provisions of Rule 123 of the Tax Court Rules of Practice and Procedure; it is further

ORDERED and DECIDED: (1) That there are deficiencies and additions to tax due from petitioner as follows:

Year	1982	1983	1984
Deficiency	$4,354.00	$4,301.00	$2,289.00
Additions To Tax, Secs:			
6651(a)(1)	$1,088.50	$1,075.25	$672.25
6653(a)(1)	$217.70	$215.05	$114.45
6653(a)(2)	*	**	***
6654	$423.82	$263.31	$143.91

* 50 percent of the interest due on $4,354.00

** 50 percent of the interest due on $4,301.00

*** 50 percent of the interest due on $2,289.00

(2) that damages are due from petitioner which are hereby awarded to

the United States in the amount of $7,000 pursuant to section 6673, Internal Revenue Code of 1954, as amended.

Entered: April 30, 1990

Signed By:

Lee M. Galloway
Special Trial Judge

T. C. Memo. 1990-188

UNITED STATES TAX COURT

ROBERT J. URWYLER, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 5688-89

Filed April 10, 1990.

Christopher J. Croudace, for the respondent.

MEMORANDUM OPINION

GALLOWAY, Special Trial Judge: This case was assigned pursuant to the provisions of section 7443(b) of the

Internal Revenue Code of 1954, as amended, and Rule 180 et seq.[1]

In separate notices of deficiency for each taxable year dated January 19, 1989, respondent determined deficiencies in, and additions to, petitioner's Federal income taxes as follows:

Year	1982	1983	1984
Deficiency	$4,354.00	$4,301.00	$2,289.00
Additions To Tax, Secs:			
6651(a)(1)	$1,088.50	$1,075.25	$672.25
6653(a)(1)	$217.70	$215.05	$114.45
6653(a)(2)	*	**	***
6654	$423.82	$263.31	$143.91

* 50 percent of the interest due on $4,354.00
** 50 percent of the interest due on $4,301.00
*** 50 percent of the interest due on $2,289.00

The adjustments in the notices of deficiency resulted from (1) petitioner's failure to report on timely filed returns income received from John Urwyler in the respective amounts of $20,356, $21,418,

and $15,543, for the years 1982, 1983, and 1984; and (2) the additions to the tax disclosed above. Petitioner was a resident of Modesto, California, when his petition herein was filed on March 23, 1989.

The petition consists of four pages of tax protester allegations in which petitioner generally contends that he is a resident and citizen of the "Republic of California" and therefore not subject to the jurisdiction of the United States and its income tax laws as encompassed in the Internal Revenue Code. This Court has held in many cases that pleadings containing similar contentions of a taxpayer mandate a dismissal of the taxpayer's case for failure to state a claim upon which relief can be granted under the rules of this Court. Derksen v.

Commissioner, 84 T.C. 355, 359-360 (1985). See also Masters v. Commissioner, T.C. Memo. 1989-212. In such cases, this Court has also awarded the United States damages (now called a penalty) under section 6673 in the maximum amount of $5,000 on the ground that the taxpayer's position maintained in the proceedings was frivolous or groundless and/or maintained primarily for delay. Derksen v. Commissioner, supra at 361; Masters v. Commissioner, supra.

In this case, respondent filed an answer on May 11, 1989, in which he denied petitioner's allegations and contended the allegations were frivolous or groundless, as support for his claim of $5,000 damages (penalty) under section 6673.

In Petitioner's Response To Respondent's Answer filed June 8, 1989, petitioner formulated the following reply to respondent's affirmative allegations:

> 7. Petitioner denies Respondent's claim for damages pursuant to I.R.C. section 6673. Petitioner's proceedings before the Tax Court were not instituted for delay, but are based on the clear and well delineated mandate of Congress of the United States.

The general provisions of our discovery rules are set forth in Rule 70(a), which provides in part:

> (2) Time For Discovery. Discovery shall not be commenced, without leave of Court, before the expiration of 30 days after joinder of issue (see Rule 338),***.

Rule 38 provides that a case shall be deemed at issue upon the filing of the answer, unless a reply is required. Here, joinder of issue took place when petitioner responded to the answer on

June 8, 1989. On July 13, 1989, petitioner mailed Petitioner's First Interrogatories To Respondent pursuant to Rule 71, which contained nine pages and 34 questions. The interrogatories relate to the frivolous protester-type allegations in the petition rather than to the issues determined in the notice of deficiency.

On August 15, 1989, the Court sent petitioner a notice setting the instant case for trial at the trial session beginning on October 30, 1989, in San Francisco, California. That notice contained the following provisions:

> The calender for the Session will be called at 10:00 A.M. on that date and both parties are expected to be present at that time and be prepared to try the case. YOUR FAILURE TO APPEAR MAY RESULT IN DISMISSAL OF THE CASE AND ENTRY OF DECISION AGAINST YOU.

> Your attention is called to the Court's requirement that, if the case cannot be settled on a mutually satisfactory basis, the parties, before trial, must agree in writing to all facts and all documents about which there should be no disagreement. Therefore, the parties should contact each other promptly and cooperate fully so that the necessary steps can be taken to comply with this requirement. YOUR FAILURE TO COOPERATE MAY ALSO RESULT IN DISMISSAL OF THE CASE AND ENTRY OF DECISION AGAINST YOU.
>
> If there are a number of cases to be tried, the Court will fix the time of each trial at the end of the calender call. The Court makes every effort to suit the convenience of the petitioners in fixing trial times, but because of conflicting requests received from petitioners, the final determination of trial times must rest in the Court's discretion.

On August 25, 1989, respondent filed a Motion For A Protective Order to which he attached a copy of petitioner's first interrogatories mailed to him by

petitioner on July 13, 1989. respondent alleged that petitioner's formal discovery was improper because the parties had not yet consulted and communicated informally as required by Branerton Corp. v. Commissioner, 61 T.C. 691 (1974). On August 28, 1989, the Clerk received a document from petitioner which was filed on that date as petitioner's motion for continuance. This document reads as follows:

> The Petitioner objects to a trial date being set at this time, and hereby declares that this case will not be ready for trial by the Trial Session beginning October 30, 1989.
>
> The Petitioner is in the Process of Discovery according to the Rules of Practice and Procedure United States Tax Court. If the Court proceeds with the trial during the Trial Session beginning October 30, 1989, the Petitioner will be denied his right to effective Discovery. The Petitioner would like to remind the Court that,

> "Any party may, without leave of Court, serve upon any other party written interrogatories to be answered by the party served...," Rule 71(a).
>
> The Petitioner cannot at this time anticipate a trial date due to the fact that Respondent has not yet answered Petitioner's first interrogatories. Depending upon Respondent's answers, Discovery may continue for several months.
>
> It has been the Petitioner's past experience that the Respondent has never been a willing participant in the Discovery process.
>
> The Petitioner will duly notify the Court when Discovery has been completed.

By order dated August 31, 1989, and served on petitioner September 1, 1989, the Court granted respondent's motion for a protective order pursuant to Rule 103(a)(3) and denied petitioner's motion for continuance. In its order dated August 31, 1989, the Court further ordered:

that in the event that the parties cannot reach a mutually satisfactory basis of settlement of the issues in this case after making reasonable efforts to do so, said parties are to prepare for trial in accordance with the Court's instructions mailed to the parties along with the Notice Setting Case For Trial on August 15, 1989, giving particular attention to the following paragraphs:

STIPULATION: If the case cannot be settled, at least the parties should agree in writing, to the fullest extent possible,, to all material facts and documents that are not, or fairly should not be, in dispute. Deliberate failure or refusal to stipulate such facts and documents may result in a finding against the offending party.

CONTINUANCES: Postponement of cases set on a trial calender will normally not be granted; only the most unusual and compelling circumstances immediately communicated to the Court will justify any exception.

On September 1, 1989, petitioner mailed the following documents to the

Court: (1) petitioner's Motion To Compel Answers to Interrogatories; and (2) petitioner's Opposition To Respondent's Motion For A Protective Order, which was filed by the Clerk of the Court as petitioner's Motion To Vacate Court's August 31, 1989 Order. These motions were denied by the Court on September 7, 1989. On September 11, 1989, counsel for respondent attempted to secure petitioner's cooperation in preparing the case for trial by entering into a stipulation of facts. Petitioner refused to cooperate.

On October 16, 1989, respondent filed a motion for damages (penalty) pursuant to section 6673, which was calendered for hearing at the calender call of this case on October 30, 1989. Prior to the calender call, respondent

express-mailed to petitioner on October 27, 1989, a proposed stipulation of facts with copies of exhibits. Respondent called petitioner's attention to the stipulation Provisions of the Court's Above-Referred August 31, 1989, order. Petitioner was advised that if he failed to stipulate facts, respondent would move to dismiss petitioner's case for failure to properly prosecute as well as seek damages (penalty) under Section 6673.

On October 30, 1989, this case was regularly called for trial. There was no appearance by or on behalf of petitioner. the court ordered counsel for respondent to write petitioner with respect to this failure to appear and to inform petitioner that his case would be recalled for trial at 10:00 A.M. on

November 2, 1989. On October 31, 1989, pursuant to the Court's order, counsel for respondent mailed a letter to petitioner by express-mail, advising petitioner that his failure to appear on the date and at the time scheduled for trial would result in a motion by respondent to dismiss petitioner's case for lack of prosecution. Petitioner did not reply to respondent's letter.

On November 2, 1989, this case was recalled for trial. Again, there was no appearance by or on behalf of petitioner. Respondent's attorney then filed a Motion To Dismiss For Failure To Properly Prosecute and renewed his October 16, 1989 motion for damages (penalty) pursuant to section 6673. Respondent's motion to dismiss for failure to properly

prosecute and for damages (penalty) were taken under advisement.

With respect to respondent's motion to dismiss, Rules 123(b) and 149(a) provide as follows:

> Rule 123(b) Dismissal: For failure of a petitioner properly to prosecute or to comply with these rules or any order of the Court or for other cause which the Court deems sufficient, the Court may dismiss a case at any time and enter a decision against the petitioner. The Court may, for similar reasons, decide against any party any issue as to which he has the burden of proof; and such decision shall be treated as a dismissal for purposes of paragraphs (c) and (d) of this Rule.
>
> * * *
>
> Rule 149(a) Attendance at Trials: The unexcused absence of a party or his counsel when a case is called for trial will not be ground for delay. The case may be dismissed for failure properly to prosecute, or the trial may proceed and the case be regarded as

submitted on the part of the absent party or parties.

Dismissal of a case is a sanction resting in the discretion of the trial court. Durgin v. Graham, 372 F.2d 130, 131 (5th Cir. 1967); Levy v. Commissioner, 87 T.C. 794, 803 (1986). See also Cassuto v. Commissioner, T.C. Memo. 1989-62. Since the record discloses that petitioner did not appear at Court on October 30, 1989, and on November 2, 1989, when his case was called for trial and refused all attempts by respondent to prepare the case for trial, respondent's motion to dismiss as to both the deficiencies and additions to the tax determined under sections 6651(a)(1), 6653(a)(1), 6653(a)(2), and 6654(a), will be granted.

We now consider respondent's motion for $5,000 damages (penalty) pursuant to section 6673. This Court has repeatedly awarded damages (penalty) under section 6673 in cases which have been dismissed under Rule 123(b) due to taxpayer's failure to properly prosecute his case. See Masters v. Commissioner, T.C. Memo. 1985-116, affd. by unpublished opinion 791 F.2d 937 (9th Cir. 1986); see also Meade v. Commissioner, T.C. Memo. 1988--473. Section 6673, as applicable to proceedings commenced after October 22, 1986, provides, in part:

> Whenever it appears to the Tax Court that proceedings before it have been instituted or maintained by the taxpayer primarily for delay, that the taxpayer's position in such proceeding is frivolous or groundless, or that the taxpayer unreasonably failed to pursue available administrative remedies, damages in an amount not in excess of $5,000 shall

> be awarded to the United States by the Tax Court in its decision. * * *

Moreover, as to positions taken after December 31, 1989, in proceedings which are pending on or commenced after such date, section 6673(a)(1) as amended by the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, sec. 7731(a), 103 Stat. 2400, provides that "the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000." The House Budget Committee Report, H. Rept. 101-247 explains the reasoning with respect to the increased amounts this Court may award the United States under the provisions of section 6673, as follows:

> Sanctions and costs awarded by courts. --The bill authorizes the Tax Court to impose a penalty not to exceed $25,000 if a taxpayer (1) institutes or maintains a proceeding primarily for delay,

(2) takes a position that is frivolous, or (3) unreasonably fails to pursue available administrative remedies. The committee intends that the increased penalty (above $5,000) apply primarily (but not exclusively) to tax shelter cases, where the $5,000 maximum provided under present law appears to be ineffective in deterring taxpayers from taking frivolous positions. [Emphasis added.]

The committee has explicitly chosen to call these awards "penalties," rather than "damages" (as under present law), so that it is clear that specific damages incurred by the United States need not be proved before the court may impose this penalty. The committee believes that dealing with these frivolous lawsuits wastes scarce judicial resources and delays the resolution of legitimate disputes. The committee expects that its modifications to this provision will further decrease frivolous lawsuits. The committee also intends to monitor the use of this penalty to ensure that it continues to be used, as it has in the past, only in situations in which its use is appropriate. The committee has also called these awards "penalties" rather than

> "damages" in the parallel provisions applicable to other courts. * * * [H. Rept. 101-247, at 1399-1400 (1989)]

We believe that this record merits a penalty award in excess of $5,000. The entire record discloses that (1) petitioner has instituted and maintained this action primarily for delay, (2) the position he has taken in this action is frivolous, and (3) petitioner has unreasonably failed and refused to pursue available administrative remedies in proceeding with this action.

Petitioner was advised as early as respondent's answer that he could be liable for a penalty award for maintaining a frivolous position in his lawsuit before this Court. This admonishment did not deter petitioner. He replied to respondent's answer claiming the proceedings before this Court were

based on "clear and well delineated mandate of Congress of the United States."

Petitioner was well aware of the time limitations of this Court's rules in his pursuit of discovery. He commenced discovery 5 days after the earliest time permissible under Court rules (see Rule 70(a)(2) but ignored rules requiring conditions to be met before the commencement of discovery. Respondent was required to move for a protective order to avoid the burden of replying to nine pages of irrelevant protester-type interrogatories. The Court granted respondent's protective order request.[2]

It appears to us from the sophisticated manner in which petitioner framed his protester allegations and

interrogatories, his refusal to reply to respondent's attempts to consult and prepare his case for trial, his disregard of the Court's order concerning trial preparation and his refusal to appear at trial, that petitioner intended to abuse the Tax Court rules for the sole purpose of delaying the final disposition of his case in this Court and postpone the day he would be faced with a billing for income taxes and addition due. In early September 1989, petitioner was apparently convinced that the Court would not permit unwarranted delay of this action. He became strangely silent and had no further contact with the Court or respondent during the remaining two months before his case was called for trial.

Since the maximum amount of an award to the United States under the old law has not deterred petitioner from continuing to maintain his frivolous action, we require petitioner to pay to the United States a penalty in the amount of $7,000 pursuant to section 6673(a)(1). An appropriate order and decision will be entered.

FOOTNOTES

1 All section references are the to the Internal Revenue Code of 1954 as amended, and in effect for the years in issue, unless otherwise indicated. All Rule references are to the Tax Court Rules of Practice and Procedure.

2 In commenting on a taxpayer's claim for relief from a similar protective order, the Court of Appeals for the Ninth Circuit commented "Moore and Wade did not seek information through informal consultation; they then submitted burdensome interrogatories. The Tax Court was within its discretion to grant a protective order against discovery. * * *. * * * we publish this opinion in part to warn future appellants that the arguments we have rejected here have no place in this court." Roat et al. v. Commissioner, 847 F.2d 1379, 1383, 1384 (9th Cir. 1988(.

APPENDIX "B"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. URWYLER, Petitioner-Appellant, v. COMMISSIONER INTERNAL REVENUE SERVICE, Respondant-Appellee.	)	No. 90-70381 MEMORANDUM*

Appeal from the United States Tax Court

Submitted September 20, 1991**

Before: PREGERSON, BRUNETTI, AND NOONAN, Circuit Judges.

Robert J. Urwyler appeals pro se the tax court's dismissal of his petition for redetermination of deficiencies and additions to tax assessed by the Commissioner of Internal Revenue ("CIR")

for the tax years 1982, 1983, and 1984. The tax court dismissed Urwyler's petition for failure to prosecute pursuant to Tax Court Rules 123(b) and 149(a). We have jurisdiction to review final orders of the Tax Court under 26 U.S.C. section 7482, and we affirm in part and vacate in part.

I
Dismissal

Urwyler contends that the tax court erred by dismissing his action because the CIR does not have the authority to administer and enforce internal revenue laws against him, and because the notices of deficiency issued by the CIR were invalid depriving the tax court of jurisdiction. These contentions lack merit.

We review the tax court's decision to dismiss a case for failure to

prosecute for an abuse of discretion. Noli v. Commissioner, 860 F.2d 1521, 1527 (9th Cir. 1988)

Rule 123(b) of the Tax Court Rules of Practice and Procedure provides that the tax court may dismiss a petition for failure to (1) properly prosecute, (2) abide by the tax court rules,, or (3) comply with a tax court order. Tax Ct. R. 123(b). Pro se litigants challenging the CIR's assessments must abide by the tax court's rules. See Carter v. Commissioner, 784 F2d 1006, 1008-09 (9th Cir. 1986). Under Tax Court Rule 149(a), the unexcused absence of a party at trial is not an appropriate ground for delay, and in the event of such absence the "case may be dismissed for failure to prosecute, or the trial may proceed and the case be regarded as submitted on the

part of the absent party or parties." Tax Ct. R. 149(a). Furthermore, the tax court may dismiss a petition if the petitioner fails to present evidence on an issue on which the petitioner bears the burden of proof. Tax Ct. R. 149(b); Roat v. Commissioner, 847 F.2d 1379,, 1383 (9th Cir. 1988). "Although a court must explore meaningful alternatives prior to dismissing a case, it need not always exhaust every sanction short of dismissal before final action." Edelson v. Commissioner, 829 F.2d 828, 831 (9th Cir. 1987).

Tax Court Rule 70(a) requires that "the parties attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules." Tax Ct. R.

70(a). Additionally, "Tax Court Rule 91 requires the parties to stipulate, to the fullest extent possible, to all nonprivileged matters which are relevant to a pending case." Larson v. Commissioner, 765 F.2d 939, 941 (9th Cir. 1985).

The CIR's determinations of deficiencies and additions to tax are presumptively correct. See, e.g., Baxter v. Commissioner, 16 F.2d 493, 495 (9th Cir. 1987). Thus, the taxpayer bears the burden of producing evidence showing that the CIR's determination is incorrect. Id.

Here, Urwyler failed to appear for trial on October 30, 1989, and again failed to appear when the case was recalled for trial on November 2, 1989. Thus, Urwyler failed to present any evidence showing that the CIR's

determination of deficiencies was incorrect. Moreover, Urwyler failed to comply with Rule 70(a) by filing interrogatories and attempting to initiate formal discovery procedures prior to consulting and communicating informally with the CIR. See Tax Ct. R. 70(a). Urwyler also failed to comply with Tax Court Rule 91 by refusing to enter into a stipulation of facts. See Tax Ct. R. 91. Accordingly, because Urwyler failed to appear for trial on two occasions or prosecute his case properly, the tax court did not abuse its discretion by dismissing Urwyler's petition under Rules 123(b) and 149(a). See Edelson, 829 F.2d at 831.

II

Sanctions

Urwyler contends that the tax court erred by imposing a $7,000 penalty pursuant to 26 U.S.C. Section 6673 because "the court was without jurisdiction to adjudicate the instant case." The CIR argues that although imposition of the penalty was proper, the tax court erred by increasing the penalty from the $5,000 requested by the CIR to $7,000.

We review the tax court's imposition of sanctions pursuant to 26 U.S.C. Section 6673 for an abuse of discretion. Larsen, 765 F.2d at 941.

"The Tax Court may impose a penalty on a taxpayer...for bringing an action which is frivolous and groundless." Id. (citing 26 U.S.C. Section 6673). Section

6673 provides that the tax court may require the taxpayer to pay a penalty whenever it appears that proceedings have been instituted or maintained primarily for delay, the taxpayers position is frivolous or groundless, or the taxpayer unreasonably failed to pursue administrative remedies. 26 U.S.C. Section 6673.

Here, the tax court found that Urwyler's position in the action was frivolous, that he "instituted and maintained the action primarily for delay," and that he unreasonably refused to comply with proper procedures in proceeding with his action. Urwyler was warned in the CIR's answer that he could be liable for a penalty award for maintaining a frivolous position before the tax court. Urwyler nevertheless

persisted in asserting that he is a citizen of the "Republic of California" and thus not subject to federal income taxes. Because we agree that Urwyler's petition was frivolous, we find the tax court did not abuse its discretion by imposing a penalty on him. See id.

We agree with the CIR, however, that the tax court erred in imposing a penalty of $7,000. The Omnibus Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106, section 7731, amended 26 U.S.C. Section 6673(a)(1) by increasing the limit of a penalty assessment under the section from $5,000 to $25,000. Section 7731(d) of Pub. L. No. 101-239 provides, however, that "[t]he amendments made by this section [amending section 6673(a)(1)] shall apply to positions taken after December 31, 1989, in

proceedings which are pending on, or commenced after such date."

Here, the CIR made its motion for sanctions on October 16 and November 2, 1989. Despite the fact that the tax court did not issue a final decision imposing the penalty until April 30, 1990, the record does not indicate that Urwyler asserted his clearly frivolous position after December 31, 1989, Accordingly, we vacate the tax court's penalty award to the extent it exceeds $5,000.

AFFIRMED IN PART AND VACATED IN PART.

FILED SEP 25, 1991
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOOTNOTES

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4. Accordingly, Urwyler's request for oral argument is denied.

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. URWYLER Petitioner-Appellant, v. COMMISSIONER INTERNAL REVENUE SERVICE, Respondant-Appellee.	)	No. 90-70381 ORDER

Before: PREGERSON, BRUNETTI, and NOONAN, Circuit Judges.

The appellant's petition for rehearing is denied.

FILED JUNE 24, 1992

CATHY A CATTERSON, CLERK

U.S. COURT OF APPEALS

APPENDIX "D"

UNITED STATES TAX COURT

ROBERT J, URWYLER Petitioner, v. COMMISSIONER OF INTERNAL REVENUE Respondent.	)	Docket No. 5688-89

NOTICE OF JURISDICTIONAL DEFECT

On September 11, 1989 Petitioner has presented documentation to Respondent's Counsel Elisabeth Rawlins regarding a very serious defect in the delegation of authority with respect to Commissioner's delegation order No. 77 (Rev. 20). On September 20, 1989 Petitioner advised Counsel Rawlins of the jurisdictional defect and requested Counsel to stipulate to the fact that the statutory notices of deficiency issued to Petitioner for the years 1982, 1983 and 1984 are null and void due to T.D.O. 150-37 not being

published in the Federal Register. (See attached copy marked exhibit 11, with exhibits 1 through 5)

As of this date Respondent has not responded to Petitioner's request and further research has revealed the fact that the latest revision of Commissioner's delegation order, No. 77 (Rev. 23, dated 6-16-88) is based on the purported authority of Treasury Department Order 150-10, issued on July 10, 1986, which has not been published in the Federal register.

Treasury Department Order No. 150-10, and its predecessor,, Treasury Department Order No. 150-37, which delegate the authority to issue Notices of Deficiency to the Commissioner from the Secretary, have never been published as required by The Act of July 26, 1935

(49 Stat. 500), which created the Federal Register and required that documents of federal agencies which have an effect on the American public at large be published therein. Petitioner happens to be a part of this class of people and, accordingly, is entitled to the protection of this provision of law.

The delegation of authority given to the Commissioner of Internal Revenue pursuant to Treasury Department Order No. 150-10 is cited in Section 5 of the Commerce Clearing House Standard Federal Reporters, under paragraph 6585, it states the following:

> "U.S. Territories and Insular Possessions. The Commissioner shall, to the extent of authority otherwise vested in him, provide for the administration of the United States Internal Revenue laws in the U. S. Territories and Insular Possessions and other authorized areas of the world."

Thus, even if T.D.O. 150-10 were published and became law, it would only be applicable in the U.S. Territories and Insular Possessions and other authorized areas of the world. Therefore, the Commissioner has no authority to issue notices of deficiency and/or delegate the authority to his subordinates with respect to Petitioner, a resident and citizen of the State of California. The jurisdiction of the United States Tax Court is predicated on valid statutory notices of deficiency.

This Court does not have jurisdiction in this instant case to hold a trial or to make any rulings and determinations pertaining to Petitioner's Federal Tax liability.

Petitioner will ignore any ruling or order issued by this Court and will

address any adverse actions or determinations made by the Internal Revenue Service by appropriate federal court action.

Date: October 4, 1989.

Signed by: Robert J. Urwyler
in Propria Persona

Mailed by certified mail # P-914 175 188

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing NOTICE OF JURISDICTIONAL DEFECT was served by certified mail # P-914 175 189 on Internal Revenue District Counsel at the following address:

Christopher Croudace,
District Counsel
Internal Revenue Service
55 S. Market Street, Suite 505
San Jose, CA 95113

* * *

Please note: The Exhibits referred to in this Appendix "D" are omitted since they do not fit the document format.